

ATTACHMENT 1

Permitting & Enforcement Committee Meeting Agenda Item
Attachment

DRAFT LEA ENFORCEMENT ADVISORY

**CALIFORNIA INTEGRATED WASTE
MANAGEMENT BOARD
ENFORCEMENT ADVISORY**

ENFORCEMENT ADVISORY

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I. INTRODUCTION

GOALS AND SUMMARY

The goal of this Local Enforcement Agency (LEA) Advisory (advisory) is to assist and guide LEAs in taking any necessary enforcement actions to achieve facility compliance with solid waste laws and regulations and protect public health and safety and the environment. This advisory discusses LEA enforcement responsibilities and describes various enforcement options available to LEAs to remedy violations of solid waste laws and regulations, including both State Minimum Standards (SMS) and Solid Waste Facilities Permit (SWFP) violations. Detailed guidance on developing and implementing each enforcement option is included as well as clarification of statutes and regulations where needed.

Changes and additions to the Public Resources Code (PRC) brought about by the passage of AB 59, effective October 16, 1995, have been incorporated into this advisory, including a separate section on procedures and guidance for pursuing Administrative Civil Penalties (ACP). It should be noted that changes in the PRC brought about by AB 59 necessitate changes and additions to Title 14, California Code of Regulations (14 CCR) regarding enforcement actions for solid waste facilities. Development of regulations to include those changes and additions will begin early in 1997. Once the regulations become effective, this advisory will be updated as necessary and reissued to all LEAs.

This advisory is an integral part of the Board's overall Enforcement Policy Framework as approved by the Board in October of 1996 and is intended to partially fulfill the Board's responsibility to provide assistance and guidance to LEAs in matters of enforcement. As a follow-up to this advisory, Board staff is planning joint Board and LEA training and workshop sessions designed to improve the effectiveness and efficiency of enforcement implementation and promote information sharing between LEAs regarding which enforcement strategies work best in particular situations.

LEA ENFORCEMENT RESPONSIBILITIES

Each **Local Enforcement Agency (LEA)**, or the Board when acting as the enforcement agency, is responsible for enforcement within its jurisdiction regarding solid waste handling and disposal, pursuant to Division 30, Public Resources Code (PRC), § 43209, and Title 14, California Code of Regulations (CCR) § 18081(c) and § 18084 including:

- Applicable Provisions of Division 30, Part 4 of the PRC

- Regulations adopted under Part 4, including 14 CCR sections 17200 - 17870 State Minimum Standards for Solid Waste Handling and Disposal (SMS), 14 CCR sections 18080 - 18224, and 18250 - 18277 Administration of Solid Waste Facilities Permits and Closure/Post Closure
- Maintenance Plans, and any local standards
- Solid Waste Facilities Permit (SWFP) Terms and Conditions

Whenever the LEA identifies SWFP or SMS violations at a facility they are required to take appropriate enforcement action. 14 CCR § 18081(c) requires that all facilities and disposal sites within an LEA's jurisdiction shall be in compliance with SMS, the terms and conditions of the SWFP, be permitted or exempted, or be under appropriate enforcement action(s) pursuant to 14 CCR § 18084 to remedy the violations. A variety of enforcement options are available to LEAs and are described in PRC sections 43000 - 45024 and 14 CCR sections 18301 - 18313.

LEA RECORDKEEPING

Pursuant to PRC § 43209(f) and 14 CCR 18020, LEAs are responsible for maintaining records for each disposal site and facility within its jurisdiction. Specifically, the LEA must maintain a separate and current chronological log of legal and enforcement actions. This file shall include, at a minimum, the following information: facility or site name, address, SWIS number, the action type, the date the action was taken, and the outcome of the action(s).

BOARD RESPONSIBILITIES

As required by PRC §§ 43101(b)(8), 43217, 43219(b), 43220, 43302 and 14 CCR § 18350(c), the **Integrated Waste Management Board's** (Board) primary functions regarding an LEA's inspection and enforcement program are to:

- Provide technical assistance, training, support and guidance to LEAs.
- Ensure an LEA's performance in keeping the facilities in their jurisdiction in compliance with applicable laws and regulations, by conducting periodic inspections at those facilities and, if necessary, encouraging LEAs to take enforcement actions.

Secondarily, the Board is to function in place of an enforcement agency when it is determined that the LEA has failed to take appropriate enforcement actions, and they are unable or unwilling to do so. Various statutes and regulations describe the Board's authority, responsibilities and options when an LEA fails to take appropriate enforcement action to remedy documented violations. These include PRC §§ 43214, 43215, 43216, 43216.5, 43219(c&d), 43300, 45012, and 14 CCR 18350

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APPROPRIATE ENFORCEMENT ACTIONS

This advisory is intended to provide LEAs with a comprehensive reference document for use when taking enforcement actions at solid waste facilities. It is not intended to prescribe or define what the appropriate enforcement action should be for any particular situation. Each LEA has its own Enforcement Program Plan (EPP) which they follow when taking action on violations. LEAs have flexibility and discretion in determining appropriate enforcement actions when dealing with individual jurisdictions, facilities and issues. Effective and efficient enforcement resulting in timely operator compliance should be the goal of any LEA actions with an emphasis on results rather than any particular process. There are however, specific cases where statutes or regulations require specific enforcement actions to be taken by an LEA for particular situations. Those are discussed below. In other cases where there is no mandated enforcement response, the LEAs may determine which actions are appropriate for a particular situation, consistent with their individual Enforcement Program Plans and in conformance with procedural and content requirements found in statutes and regulations.

In reviewing LEA enforcement performance, the Board will focus on chronic violations and violations which threaten public health and safety or the environment. A **chronic violation** is any violation for which a facility is listed in the Inventory or a Significant Change permit violation (PRC § 44004) which has remained uncorrected for 5 consecutive months. A chronic violation or a violation which threatens public health and safety or the environment will prompt Board staff to initially look at the operator's progress toward achieving compliance, rather than any particular action the LEA may or may not be taking. However, if progress toward compliance is not forthcoming, the Board will consult with the LEA to determine if they are increasing their enforcement response accordingly by taking additional action(s). If not, the Board will make every effort to assist and encourage the LEA to take appropriate enforcement action to remedy the violation. However, should the LEA be unwilling or unable to take appropriate enforcement action, as a last resort, the Board may do so.

MANDATED ENFORCEMENT ACTIONS

LEAs must take the following enforcement actions for specific violations or situations:

If the LEA determines that a solid waste facility is operating without a permit, PRC § 44002 requires the LEA, as of October 16, 1996, to issue a cease and desist order pursuant to PRC § 45005 to immediately cease operations. For clarification on the applicability of this requirement, please refer to the August 20, 1996, letter from the Board to all LEAs on this subject, included as Attachment 1.

If a facility is included on the Inventory of Solid Waste Facilities Which Violate State Minimum Standards, the LEA is required to develop a compliance schedule which ensures that diligent progress is made by the operator to bring the facility into compliance. (PRC § 44106). Board staff is available to review and comment on draft compliance schedules upon LEA request. LEAs can contact their Board enforcement liaison for this type of assistance. The compliance schedule may be a stand alone document or it may be incorporated into a Notice and Order or a Stipulated Order of Compliance, both of which are discussed below under Enforcement Options.

II. ENFORCEMENT OPTIONS

Enforcement options which an LEA can use to bring a facility into compliance are described in this section. Some of the options such as a Notice of Violation or a Compliance Meeting are not found in statute or regulations. They are intended to serve as recommended examples of less formal intermediate steps between the inspection/inspection report and more formal and severe actions such as the issuance of a Notice and Order.

INSPECTIONS AND NOTIFICATION OF VIOLATIONS

This section discusses the most elementary level of enforcement which includes those actions that are meant to clearly document and notify a facility owner/operator of violations of laws or regulations and of the LEA's expectations regarding their correction. These actions may also notify the operator of the possible consequences of continued noncompliance. These actions include:

- Inspection/Inspection Report
- Notice of Violation
- Issuance of 90 day Notice of Intent
- Compliance Meeting/Compliance Agreement/Compliance Schedule

Note: The 90 day Notice of Intent is a mandatory action taken by Board staff pursuant to PRC § 44104, based on facility compliance information as documented in the LEA's inspection reports. (See details below)

■ Inspection/Inspection Report

LEAs are required pursuant to PRC § 43218 and 14 CCR § 18083 to inspect all solid waste facilities and sites at specified frequencies. Enforcement action typically starts with an inspection of the solid waste facility or site using applicable statutes and regulations. At the time of an inspection, the LEA should identify and document all violation(s) and areas of concern. During an exit interview, the inspector should discuss any violation(s) and areas of concern with the operator. After an inspection, an inspection report is issued to the owner and/or operator or mailed using the appropriate Solid Waste Information System (SWIS) inspection forms. The form identifies actual violations as well as areas of concern which have the potential of becoming a violation. Comments regarding the specific nature and location of the violations are also included as applicable. The report may generally direct the operator to take action to correct the violations or request a workplan for correction. In addition, all previously documented violations which have been corrected since the last inspection should be noted as such. (See LEA Advisory # 15 for further guidance on filling out SWIS forms and LEA Advisories # 20 and 23 for further guidance on conducting and documenting a landfill inspection or a transfer/processing station inspection respectively.)

■ Notice of Violation

A Notice of Violation (NOV) is a separate notice to the operator, usually as a follow up to an inspection report, which serves to focus the operator's attention on a particular violation and the need to correct it. It may be used for chronic violations where the operator has failed to respond to the LEA's inspection reports or for more serious violations. In the latter case, the LEA may wish to immediately impress upon the operator the seriousness of the violation and the need for quick corrective action.

The NOV should include comments regarding the specific nature and location of the violations, and, as applicable, may direct the operator to take corrective actions by a specified date or request a workplan for correction with a specified date for submittal by the operator for EA review and approval. The workplan should consist of a description of actions for correcting the violations and specific dates by which the actions will be completed. The NOV may also be used to request the operator to contact the LEA to set up a compliance meeting. Additionally, the consequences for continued non-compliance, such as the issuance of a Notice and Order by the LEA with potential assessment of ACPs, or a 90 day Notice of Intent to include the facility on the Inventory by the Board, may be spelled out in the NOV. A NOV is not specifically referenced in statute or regulation but can be considered a part of the process which provides the operator a reasonable opportunity to bring the facility into compliance (due process) prior to assessing Administrative Civil Penalties pursuant to PRC §§ 45010 and 45011. In this case, the LEA should include in the NOV, a notification to the operator of their right to a compliance meeting. An example of a NOV is included in attachment 2.

Note: Examples of enforcement documents in the appendices are offered in response to various LEA requests and are not intended to be mandated formats for all LEAs to conform with, but are merely one possible format.

■ Issuance of a 90-Day Notice of Intent (NOI)

Board and LEA staff implement the Inventory of Solid Waste Facilities Which Violate State Minimum Standards (Inventory) as required by PRC § 44104. Facilities are routinely surveyed every two months by Board staff using LEA inspection reports. Any facility which has a repeat violation for the same standard during the two month survey period is issued a NOI. For example, any facility violating one or more state minimum standards during September, which was not corrected in October, would be issued an NOI. The process would then be repeated for the next two months, November and December, then January and February etc. The NOI informs the operator of the continuing violations and gives them 90 days to correct them. Failure to correct the violations as documented by the LEA results in inclusion of the facility on the Inventory.

Once a facility is included on the Inventory, PRC § 44106 requires the LEA to develop a compliance schedule which will ensure that diligent progress will be made to bring the facility into compliance. The compliance schedule may be a stand alone document or in the form of a N&O pursuant to PRC § 45011. Should the owner/operator fail to comply with the compliance schedule, further enforcement action must be taken by the LEA as appropriate. Facilities already operating under an enforcement order prior to being included in the Inventory can continue to work under the existing order unless it needs to be revised.

■ Compliance Meeting/Agreement/Schedule

There is a point in the enforcement process when compliance meetings may provide a valuable tool to bring about compliance. Relatively serious or repeat violations that have not been corrected as a result of previous inspection reports or a NOV could trigger a compliance meeting. Additionally, prior to the issuance of an order which imposes an administrative civil penalty, an operator may request a compliance meeting pursuant to PRC § 45011(b)(2).

If a previous enforcement action has been ineffective in gaining compliance or if a violation(s) is chronic in nature, or is seen as a potential threat to public health and safety or the environment, the LEA may schedule a formal meeting with the operator and/or owner, and other appropriate regulatory agencies. The purpose of the compliance meeting is to discuss the specific violation(s) and determine how compliance may be obtained without having to initiate further enforcement actions. The LEA should attempt to identify what kinds of obstacles, if any, are preventing the operator from correcting the violations, and work with the operator to find solutions to expeditiously correct them. All parties should agree on the corrective measure(s) and timetable for correction. If no agreement can be reached, a N&O may need to be issued. During the meeting, it should be explained that failure to make acceptable progress toward the correction of violations will result in enforcement action(s) such as a N&O. Compliance meetings may be held with or without the benefit of prior enforcement action(s), as appropriate.

The LEA should draft a summary of the compliance meeting including the date, time, location, parties present, reason for the meeting, the violations or problems discussed, and the results of the meeting, including any agreements or resolutions regarding further actions by either party. It is requested that the LEA mail the summary to the participants and Board enforcement staff for inclusion in the facility file. By including it in the Board's facility file, a complete chronicle of LEA enforcement actions is made available to the public in the event of a records request regarding the subject facility. It also enables Board staff to document progress toward compliance in the SWIS database.

A compliance agreement may be the result of a compliance meeting. This is a written agreement between the owner/operator and the LEA including a workplan which specifies a timetable

and remedial actions that are acceptable to both. The plan should outline a program for assuring continued compliance, including a description of the actions and resources, equipment, personnel, and quality control measures to be used to achieve compliance. When a compliance agreement is used, it is usually not acceptable for an operator to simply state that he or she will comply with a particular standard. The operator should be held to specific dates to report progress on the completion of each task and by which all violations will be corrected. (See attachment 3 for examples of a compliance agreement, and a compliance schedule).

A compliance schedule could be proposed by the operator and approved by the LEA or dictated by the regulatory agency. Operator agreement on the conditions and timeframes in the compliance schedule may not necessarily be sought if severe violations exist. Compliance schedules may result from compliance meetings/compliance agreements, from a NOV, or a Notice and Order (PRC § 45011(b) and 14 CCR § 18304). Also, when a site is included in the Inventory, the LEA must develop a compliance schedule to ensure that diligent progress is made to bring the facility into compliance (PRC § 44106).

NOTICE AND ORDERS

LEAs have the authority and responsibility to pursue more serious enforcement actions and legal measures to correct any SMS or SWFP violations, as necessary. This section describes the Notice and Order process, including specific guidance on development, issuance and follow up enforcement should the operator fail to comply.

In order to reduce overlap, LEA staff should be familiar with the regulations of other state and local agencies within its jurisdiction which have the authority to regulate the design, operation or closure of a solid waste facility. The LEA should coordinate action relating to solid waste management with the appropriate local, state, and federal agencies based upon jurisdiction and should request enforcement response by the appropriate agency when indicated (PRC § 43209(b)). This includes consultation with the local health agency concerning enforcement actions which involve health standards included in PRC § 43209(g). In addition, LEAs should coordinate with local Air Districts regarding responses to odor complaints from composting facilities pursuant to PRC § 43209.1 (see LEA advisories # 32 and 33 for Board guidance).

In rare cases when an enforcement response is anticipated by both the LEA and an additional regulatory agency (local, state, or federal), the action should be coordinated to avoid duplication. Examples of agencies which may regulate certain aspects of a solid waste facility are: State Department of Health Services, Department of Toxic Substance Control, State Water Resources Control Board, Regional Water Quality Control Boards, and the Local Air Pollution Control or Air Quality Management Districts.

■ Basic Information

The following information is required to be included in a N&O pursuant to 14 CCR 18304(b):

- The identity of the enforcement agency
- The name or names of each person to whom it is directed
- A description of the site of the violation
- A description of the violation
- The statutes, regulations or permit terms and conditions being violated
- The date of issuance and signature of an authorized employee of the EA

14 CCR 18304(c) requires the EA to attach to the N&O a declaration or affidavit of an employee of the EA stating that the allegations contained in the N&O are based upon either personal knowledge or information and belief. If the basis of the allegations is personal knowledge, the EA should state how that knowledge was obtained, including the date of any inspection. If the basis of the allegations is information and belief, the EA should state generally the source of the information. However, the EA is not required to divulge the identity of an informant.

■ Types of Orders

The LEA may issue a **Corrective Action Order** requiring the owner or operator of a facility to take corrective action to abate a nuisance, or to protect human health and safety or the environment. (PRC § 45000.) The LEA also has the authority to issue a **Cease and Desist Order** to the owner or operator to address SWFP or SMS violations, facilities operating without a SWFP, or situations which threaten to cause a condition of hazard pollution or nuisance. (PRC § 45005.)

A **Compliance Schedule Order** may also be issued pursuant to PRC § 45011(a)(1), to bring a facility into compliance with the PRC, 14 CCR regulations, any corrective action order or cease and desist order, or if the facility poses a potential or actual threat to public health and safety or the environment. The order establishes a compliance schedule according to which the facility will be brought into compliance with the documented violations. The order may also provide for Administrative Civil Penalties (ACP) to be imposed if compliance is not achieved within the established time schedule.

Note: Prior to issuing a N&O which proposes to levy ACPs for failure to comply by compliance deadlines, the LEA must do both of the following:

- 1) Notify the operator of the solid waste facility that the facility is in violation, specifying the PRC or CCR code section or the permit term or condition being violated. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator

notification. In the SWIS form or the NOV, the LEA should inform the operator of the right to request a compliance meeting. Also, the LEA may wish to include a statement that failure to correct the violations may result in the pursuit of ACPs.

2) Upon the request of the operator of the solid waste facility, hold a compliance meeting with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date. (Refer to the section on Assessing Administrative Civil Penalties for complete details on the ACP process).

The EA may choose to combine in one N&O any of the three types of orders discussed above. For example, an EA may wish for the operator to both cease and desist specified actions *and* take corrective action to clean up and abate specified conditions. An EA may also want to order the operator to take other actions as necessary to correct a violation by a specified date pursuant to a compliance schedule. Additionally, any of the various types of Notices discussed below can be incorporated into a N&O in different combinations in order to customize an EA's enforcement response.

When the owner/operator violates SMS which do not also constitute a hazard, pollution, or nuisance then a corrective action order cannot be issued. In such a case, the N&O may include an order to cease and desist or a time schedule by which the facility will be brought into compliance, and any applicable notices. (PRC §§ 45005, 45011 and 14 CCR § 18304.) The following are notices which may be included in a N&O:

- **Types of Notices**

- Notice informing the owner/operator that the LEA may contract for corrective action if the owner or operator fails to comply by the deadline in a final order. (PRC § 45000.)

- Notice for Administrative Civil Penalties:

- Option 1: Notice informing the owner/operator that the enforcement agency **may take action to impose** administrative civil penalties (ACPs) upon failure to comply with applicable compliance deadlines in a final order.

- Option 2: Notice informing the owner/operator that the enforcement agency is **conditionally imposing** administrative civil penalties in a specified amount, and will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order. (PRC §§ 45011.) Under this option, the LEA would concurrently notify the governing body of its intent to impose ACPs. For more details

on options 1 and 2, please refer to the section on Assessment of Administrative Civil Penalties.

- Notice informing the owner/operator that failure to comply by the deadline in a final order may result in the LEA petitioning the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court. (PRC § 45014(a&b).)
- Notice informing the owner/operator that upon failure to comply with a compliance deadline, the enforcement agency may bring an action in the superior court to impose upon the owner/operator civil penalties. (PRC §§ 45014(c) & 45023.)
- Notice informing the owner/operator that the enforcement agency may take action to suspend or revoke the permit for the facility upon failure to comply with applicable compliance deadlines. (PRC §§ 44305 & 44306.)

The EA may incorporate any of the notices above in any combination into a N&O. It is recommended that the EA include as many notices as are applicable to the situation to give greater flexibility in enforcing the order should the operator fail to comply.

Please note that the LEA can only take corrective action or collect ACPs upon failure of the operator to comply with a final Notice and Order. (See section on Requests for Hearings; Final Orders, on page 12 for the definition of a final order). However, the last three potential actions listed in the Notices above (court action to enjoin violations, court action to assess Civil Penalties, or action to suspend or revoke a SWFP) can be initiated in one of two ways:

- upon failure of the operator to comply with a final order, or;
- independently of the N&O and hearing panel process

For example, an LEA can file an action in superior court to enjoin a violation or assess civil penalties at any time, regardless of whether a N&O has been issued, or, if one has been issued, whether or not it has become final. Although the statutes allow for the LEA to take these types of actions independent of the N&O process, it is recommended that the LEA only pursue this option in cases where the operator intentionally or negligently violates SWFP or SMS requirements which result in a threat to public health and safety or the environment.

• Stipulated Notice and Orders

Typically, a Notice and Order is issued unilaterally by the LEA without the consent of the operator. A Stipulated Order of Compliance (Stip) has been used in the past by LEAs as an

alternative to the Notice and Order. A Stip is signed by the operator who agrees with its terms and conditions. Both types of enforcement actions describe the existing violation(s) and direct the operator to take specific corrective action(s) by a specific date(s), and include Notices that non-compliance may result in further enforcement action. The main difference between a Stip. and the compliance agreement discussed on page 6, is that the Stip contains notices or remedies regarding further enforcement action for non-compliance, whereas the compliance agreement does not. The Stip is generally for more serious violative conditions, or for when the LEA feels that a threat of more serious enforcement action for failure to comply is needed.

A Stip is not addressed in current statute or regulation. It is recommended that LEAs consult with their legal counsel to discuss whether a N&O or a Stip is more appropriate for any particular case. However, it may prove to be a valuable tool because an operator would be unlikely to request a hearing pursuant to PRC § 44307 regarding an enforcement action that it agreed to in the Stip.

Note: Templates of a Notice and Order, Stipulated Order of Compliance, and a Declaration were previously sent to all LEAs. Please contact your Board enforcement liaison should additional copies be needed.

• N&O Development

Time frames for drafting and issuing a N&O will vary, depending on the type and severity of the violation, the existence of a threat or potential threat to public health and safety or the environment, the LEA's local policies and procedures for legal review and approval, and other factors. However, if a site is threatening public health or safety, and the LEA has decided to issue a N&O, a maximum of 24 hours is recommended for drafting and issuing the N&O.

Prior to issuing N&Os, the LEA should consult with the other appropriate environmental regulatory agencies. In addition, the EA should consult with the local health agency concerning enforcement actions which involve health standards. (PRC § 43209.) Written notification to other agencies is required 10 days prior to the issuance of a N&O which involves violations that may also be under the jurisdiction of another state regulatory agency. (Consult PRC § 45019 for the specific agencies and the details for noticing). Although not required by statute or regulation, it is requested that the EA provide their Board enforcement contact with a draft copy of enforcement orders for a 5 working day review and comment period. This time frame can be much shorter, particularly in an emergency situation, by working with the appropriate enforcement branch liaison at the Board. In addition, the LEA is required to transmit enforcement orders to the Board within 5 business days of issuance. (14 CCR § 18304.)

• Requests for Hearings; Final Orders

When an operator receives a N&O, a request may be made to the LEA to hold a hearing pursuant to PRC §§ 44307 and 44310. The request must be made within 15 days of receipt of the N&O which should be sent return receipt requested. In order to satisfy due process, it is recommended that the LEA place language in the cover letter of the N&O regarding the operator's right to a hearing, including the time frame for requesting a hearing.

Should a hearing be held, the operator may subsequently appeal the decision of the hearing panel to the Board or to the Superior Court. During the local hearing panel and appeal processes, the effect of the N&O is stayed, unless there is a substantial or imminent threat to public health and safety or the environment. (PRC § 45017). If the LEA determines that there is a substantial or imminent threat to public health and safety or the environment, it should be so stated in the N&O. If the operator requests a hearing in this case, the LEA should still schedule one. However, during the hearing and appeal process, the LEA should proceed as if the N&O was final, taking further enforcement actions as stated in the N&O if the operator fails to comply by the deadlines. Once the hearing panel and appeal process is completed and the order becomes final, the LEA can make any necessary adjustments in their enforcement actions, depending on the hearing panel's or Board's decision.

If the operator requests a hearing when there is no threat, and the effect of the N&O is stayed, an order may not become final for 90-120 days, when the hearing panel issues its decision. If the operator appeals the hearing panel's decision to the Board, another 70-120 days could go by before the Board issues its decision and the order becomes final. PRC § 44305 also provides for an emergency appeal hearing, where an LEA has suspended a permit. An LEA Advisory providing detailed guidance on hearing panel and appeal procedures is currently planned by Board staff.

An order becomes final when either:

- 1) A N&O has been requested by the operator to be reviewed by the local hearing panel, and the hearing process has been completed pursuant to PRC §§ 44307 & 44310, and any subsequent appeals to the Board or Superior Court have been resolved pursuant to PRC § 45030 - 45042, or;
- 2) A N&O was not requested by the operator to be reviewed by the local hearing panel within 15 days of receipt. (PRC 44310).

• N&O Timelines and Extensions

Notice and Order timelines should allow a reasonable time for correction, with intermediate timeframes established for specific document submittals or other EA requirements, including a date

certain for compliance with all SMS and/or SWFP terms and conditions. The dates are to be determined on a case by case basis, depending on the circumstances at each facility. No protracted compliance schedule should be incorporated into a N&O for any facility that has known environmental or public health and safety problems as a result of the violations. Timelines should generally not be extended when the owner/operator does not comply with the requirements specified in the N&O. Instead, the EA should take the next enforcement action step as stated in the order. However, N&O extensions may be warranted where the operator has made a good faith effort to comply with the N&O but has experienced extreme, unforeseen circumstances, outside their control which has directly resulted in failure to meet a N&O deadline. When extending deadlines, the LEA should document in the amended N&O the operator's good faith efforts, including tasks completed thus far, and the extenuating circumstances. Examples of extenuating circumstances outside of the operator's control might include acts of God such as inclement weather, earthquakes etc, or delays in obtaining discretionary permits or other government agency approvals.

ENFORCEMENT OF NOTICE AND ORDERS

The following actions to enforce a N&O may be taken by the LEA:

- Contract for Corrective Action to cleanup and abate
- Petition the Superior Court for injunctive relief
- Notify the operator and the governing body of the LEA's intent to impose Administrative Civil Penalties
- Petition the Superior Court for Civil Penalties
- Take action to Suspend or Revoke Permit

A determination of non-compliance with a Notice and Order should be made based on an LEA inspection documenting personal observation of failure to correct the conditions which caused the issuance of the N&O. If the owner and/or operator fails to comply by the deadline in a N&O, the LEA may take action as specified in the N&O. (14 CCR § 18305). Enforcement of the N&O will depend upon which notices were included, and which one(s) the LEA chooses to proceed with.

• Legal Representation

It is recommended that when actions require legal representation, the LEA should have the case file ready for referral to the appropriate counsel within 15 days of failure to comply with any N&O deadline. Additionally, 14 CCR § 18084(c) states:

"If in the course of an enforcement action, the LEA deems legal counsel to be necessary to achieve enforcement, compliance, relief, or the assessment of monetary penalties through the courts, the LEA shall utilize legal counsel which will be prepared to initiate legal proceedings

within 30 days of notification" (14 CCR § 18084(c)).

The LEA should establish appropriate time frames with its legal counsel for the review of cases referred for legal action and the filing of further enforcement action. Details of this arrangement should be described in the Enforcement Program Plan. (14 CCR § 18077). The LEA should work with its legal counsel to identify all items to be included in the case file prior to referral. If the LEA is required to appear in court, the LEA staff who will appear should request legal counsel to provide a briefing on courtroom proceedings prior to the legal proceeding. The Board shall be notified within 5 business days of any actions taken by the LEA to enforce a N&O. (14 CCR § 18305).

Corrective Action Order Enforcement

If an operator fails to take corrective action as specified in a final order by the compliance deadline the LEA or the Board may contract for the corrective action to be completed by an outside party. The owner or operator shall reimburse the LEA or the Board for the amount expended, including, but not limited to, a reasonable amount for contract administration, and an amount equal to the interest that would have been earned on the expendable funds. The amount expended shall be recoverable in a civil action by the Attorney General, upon request of the LEA or the Board. (PRC § 45000).

Cease and Desist Order or Compliance Schedule Order Enforcement

Included in the Cease and Desist Order or the Compliance Schedule Order will be one or more of the last four types of notices described on pages 9 and 10 regarding actions that the EA may take if the operator fails to cease and desist illegal, unpermitted or violative activities or clean up violative conditions. On or after the date specified in the N&O, the local enforcement agency may take action. The action will of course depend on the notice(s) included in the N&O which are elaborated on below.

▪ Administrative Civil Penalty (ACP) Notice Enforcement

Option 1: If the final N&O includes a notice which states *"the enforcement agency may, on or after a specified date, take action to impose upon the operator, administrative civil penalties"*, then once the specified date has passed, the LEA may initiate enforcement of the notice by issuing a Notice and Order for Penalty Assessment (NOPA) to the operator with a copy sent to the governing body regarding its intent to impose ACPs.

Option 2: If the final N&O includes a notice which states *the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, and will be due and payable upon failure to comply with applicable compliance deadlines in a final order,*

then once the specified date in a final order has passed, the LEA will notify the operator of the exact amount of the penalties and that they are now due and payable.

Note: Please see the detailed section on ACP assessment for complete information on enforcement of this notice. A sample NOPA is included as Attachment 7 Also, for a summary comparison of Administrative Civil Penalties vs. Civil Penalties, please refer to the Civil Penalty section below.

- **Superior Court Injunction Notice Enforcement**

If the final N&O includes a notice which states that, "*the enforcement agency may, on or after a specified date, petition the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court*", then after the specified date, the LEA may refer the case to its legal counsel and enforce the N&O by appropriate petition or complaint filed in superior court. As an alternative, the LEA may contact the Board's legal counsel and request their assistance or the Attorney General's assistance to pursue the injunctive relief. The Attorney General is required by law in this case to pursue the injunction if so requested by the Board (PRC §§ 43215.1, 45014(a&b), & 14 CCR § 18305.)

- **Civil Penalty (CP) Notice Enforcement**

If the final N&O states that, "*the enforcement agency may, on or after a specified date, bring an action in the superior court to impose upon the owner, operator, or both civil penalties*", then once the specified date has passed, the LEA may refer the case to its legal counsel and enforce the notice by appropriate petition or complaint filed in superior court. Again, as an alternative, the LEA may contact the Board's legal counsel and request their assistance or the Attorney General's assistance to pursue civil penalties.(PRC § 45023, 14 CCR § 18305.)

Comparison of Administrative Civil Penalties vs. Civil Penalties: Administrative Civil Penalties are imposed directly by the LEA, and can only be pursued upon failure of the operator to comply with the deadlines in a final N&O. Penalty amounts are limited to \$5,000 per day per violation with a \$15,000 limit per facility per calendar year. In contrast, Civil Penalties are imposed by the courts upon petition by the LEA and may be pursued for failure of the operator to comply with the deadlines in a final N&O, or independently of the N&O process. The fines can be up to \$10,000 a day per violation with no limit on the total fine amount.

- **Permit Suspension/Revocation Notice Enforcement**

Permit suspension or revocation proceedings can be initiated in one of two ways:

- 1) As the result of an operator's failure to comply with deadlines in a N&O. The N&O would serve as the notification required by PRC §§ 44305 or 44306 and 44310.
- 2) At any time, as long as the LEA notifies the operator pursuant to PRC §§ 44305 or 44306 and 44310 of their intent to suspend or revoke the permit. The notification should be sent to the operator at least 15 days prior to taking any action to suspend or revoke the permit.

In either case, once any necessary hearings and appeals have been conducted, the LEA may take the applicable action. The hearing and appeal process for suspension or revocation is the same as that for the issuance of a N&O. **If the LEA determines that changed conditions at a facility necessitate a permit revision or modification to prevent or mitigate an imminent and substantial threat to the public health and safety or to the environment, the LEA may suspend the permit prior to holding a hearing.** The operator may appeal this action and a hearing must be conducted within three business days of the permit suspension (PRC §§ 44305).

Permit Suspension: Modification or Revision

The LEA may temporarily suspend a SWFP if the LEA determines that changed conditions at the facility necessitate a permit revision or modification to eliminate a significant threat to public health and safety or to the environment. (PRC § 44305(a)). The LEA would then cause the operator to apply for a permit revision or modification, process it in accordance with applicable statutes and regulations and forward the proposed permit to the Board for concurrence. The LEA may lift the suspension prior to the time the permit is modified or revised if the operator completes specified acts which eliminate the significant threat. (PRC § 44305(c)). Otherwise, the suspension is lifted at the time the permit is reissued.

Permit Revocation

The LEA may revoke a SWFP if the LEA determines any of the following:

- The permit was obtained by a material misrepresentation or failure to disclose relevant factual information
- The operator has, during the previous three years, been convicted of, or been issued a final order for, one or more violations of this division, regulations adopted pursuant to this division, or the terms or conditions of the SWFP, and the violation meets both of the following criteria:

- 1) The violation demonstrates a chronic recurring pattern of noncompliance which has posed, or may pose, a significant risk to public health and safety or to the environment.
- 2) The violations have not been corrected or reasonable progress toward correction has not been achieved.

If a permit has been revoked, it may be reinstated by application for a new permit no less than one year after the effective date of the revocation. (14 CCR § 18212(b).)

Note: The existing section of the CCR which addresses permit modification, suspension or revocation is inconsistent with the new laws in the PRC which address these actions. 14 CCR § 18307 requires the LEA to file an accusation with the hearing panel to initiate these actions. The PRC now requires the LEA to notify the operator of their intent to take action, then the operator must respond with a request for a hearing. If no hearing is requested, the LEA may proceed to take action without one. The CCR will be changed to conform with the existing statutes. In the interim, where a conflict exists between the PRC and the CCR, it is advised that LEAs follow the PRC when proceeding with these types of actions.

III. Assessment of Administrative Civil Penalties

INTRODUCTION

This section discusses two step by step approaches for the assessment of Administrative Civil Penalties (ACP), consistent with PRC §§ 44307-45042. When preparing a case for the assessment of ACPs, or for pursuit of an injunction or civil penalties through the superior court, or for permit suspension or revocation, LEAs may refer to Attachment 4 which contains detailed guidance on case development.

Previously in this document, under the sections on Notice and Order development and Notice and Order enforcement, we touched on two basic options for initiating the assessment of Administrative Civil Penalties (ACP). The option chosen by the LEA is determined by the type of notice included in the N&O:

- Option 1: Notice informing the owner/operator that the enforcement agency **may take action to impose** administrative civil penalties (ACPs) upon failure to comply with applicable compliance deadlines in a final order.

- Option 2: Notice informing the owner/operator that the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, which will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order.

Option 1 is a less severe type of action and allows the operator two separate opportunities to request a hearing, once when the N&O is issued and once when the ACP is actually imposed. However, because it is less threatening, the operator may be less likely to appeal when the N&O is issued. Please refer to Attachment 5 which contains a flow chart of the overall administrative civil penalty process using option 1. Option 1 gives the LEA more flexibility in pursuing alternative enforcement choices should the operator fail to comply with the deadlines in the N&O.

Option 2 is a more severe type of action and may carry more weight in getting a recalcitrant operator to comply because failure to comply will automatically result in a known and calculable penalty being assessed. Additionally, it only gives the operator one opportunity to request a hearing, which is at the time the N&O is issued (see Attachment 6 for a flow chart of ACP process using option 2). It is relatively inflexible in that the LEA is locked into a course of assessing a penalty should the operator fail to comply with deadlines.

Following is a detailed discussion of the steps to take in implementing each option. Regardless of which option is chosen, the LEA may use the Guidance on Calculating Penalties section to establish the penalty amount for each violation.

OPTION 1

Pursuant to PRC § 45011, the following outline contains the basic steps leading up to the imposition of ACPs by the LEA using option 1:

- 1) Notify the operator of the solid waste facility that the facility is in violation of this division. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator notification.
- 2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.
- 3) Issue a N&O or a Stip containing a compliance schedule according to which the facility will be brought into compliance with the documented violations. The N&O will include a notice that failure to comply may result in the imposition of ACPs.

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Note: At this point in the process, the operator may request a public hearing pursuant to PRC § 44307.

4) Document on SWIS inspection forms the failure of the operator to correct the violation(s) by the deadlines contained in the N&O.

5) Should the operator fail to comply with a N&O as described above and the LEA decide to proceed with the imposition of ACPs, a Notice and Order for Penalty Assessment (NOPA) or equivalent notification should be sent to the operator and copied to the governing body. The operator or governing body may request a duly noticed public hearing to provide an opportunity for the alleged violation(s) and the amount of any proposed civil penalty to be reviewed by the hearing panel.

Additionally, in developing the NOPA, and prior to imposing a penalty, the LEA must take into consideration the factors listed in subdivision (a) of Section 45016 and also consider alternatives to the imposition of an administrative civil penalty that would bring the solid waste facility into compliance and would achieve the same result without imposing a penalty. Other alternatives that may be considered in lieu of a penalty are community service and/or public service announcements to be paid for by the responsible party.

Components of a Notice and Order for Penalty Assessment

1. When an LEA issues an order imposing penalties, they may use the CIWMB Notice and Order for Penalty Assessment (NOPA) template as a guide (Attachment 7). The cover letter for the NOPA or equivalent document should include information regarding the operator's right to a hearing, and the time frames for requesting a hearing.

2. Each NOPA should be accompanied by a copy of the following documents as applicable:

a. SWIS Inspection Report that originally documents the violation(s). This document should be labeled as Exhibit 1.

b. A subsequent SWIS Inspection Report that documents continued violation(s). This document should be labeled as Exhibit 2.

c. Notice of Violation or other documentation which requests a Corrective Action Plan or other action from the respondent and the operator's response or lack thereof. (This step is

optional). This document should be labeled as Exhibit 3.

d. Notice & Order requesting all violations be remediated by the specified date. This document should be labeled as Exhibit 4. If the operator requested a hearing at the time of issuance of the N&O, the LEA should include a statement regarding the hearing panel decision in the NOPA, and should attach a copy of the hearing panel's decision to Exhibit 4.

e. Re-inspection report identifying the original violations/conditions as uncorrected since the initial inspection. This document should be labeled as Exhibit 5.

These exhibits will serve as documentation to indicate that all statutory requirements were followed prior to imposing an Administrative Civil Penalty.

Additionally, the NOPA should include the amount of the penalty to be imposed per violation per day, the number of days the violation(s) occurred subject to the penalty and the total penalty to be imposed. The start date for penalty accrual is up to the LEA, and could range from the date the original N&O was received by the operator, to the day after the compliance deadline in the N&O. The NOPA should state that the penalty is now due and payable. If the operator or Governing Body requests a hearing, the penalties will be stayed until the hearing is completed, any appeals have been resolved, and the NOPA becomes final. If no hearing is requested within 15 days of receipt of the NOPA, the NOPA becomes final and the penalty must be paid within 30 days pursuant to PRC § 45018.

OPTION 2

Pursuant to PRC § 45011, the following outline contains the administrative civil penalty assessment process using option 2:

- 1) Notify the operator of the solid waste facility that the facility is in violation of this division. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator notification.
- 2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.
- 3) Develop and issue a N&O or a Stip containing a compliance schedule according to which the facility will be brought into compliance with the documented violations. The N&O will include a notice informing the owner/operator that the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, which will be due and payable should the operator

fail to comply with applicable compliance deadlines in a final order.

In developing the N&O, and prior to imposing a penalty, the LEA must take into consideration the factors listed in subdivision (a) of Section 45016 and also consider alternatives to the imposition of an administrative civil penalty that would bring the solid waste facility into compliance and would achieve the same result without imposing a penalty.

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The N&O should specify a start date for penalty accrual. This will generally be the date they receive the N&O, but is up to the discretion of the LEA. The N&O should also include for each violation, a

dollar amount per day which will accrue for that particular violation as well as a compliance deadline. Please refer to the guidance on calculating the penalty below in determining the dollar amount per day for each violation.

4) The Governing Body in the city that the facility is located, or county if unincorporated, should be notified of the LEAs intent to impose ACPs at the time the N&O is issued.

5) Document on SWIS inspection forms the failure of the operator to correct the violation(s) by the compliance deadlines contained in the N&O.

6) Determine the total amount of penalty. For each uncorrected violation, multiply the dollar amount per day figure listed in the N&O by the number of days since penalty accrual began. Add the totals for each violation to get the grand total.

7) Send a notice to the operator informing them of the amount of the penalty. If the N&O is final, the notice should state that the penalty is now due and payable. If the order is not yet final, the notice should state that the penalty will be due and payable within 30 days of the order becoming final.

GUIDANCE ON CALCULATING PENALTIES

When assessing penalties, the LEA may wish to employ the Administrative Civil Penalty matrix. In order to use the matrix, violations should be classified in the following categories: minor, moderate and major.

Definitions of Violations

Minor violations for the purposes of this guidance are violations that do not pose any threat to public health, safety or the environment. This category includes violations which do not pertain to the actual design or operation of a solid waste facility or are procedural in nature.

Moderate violations are violations that pose a hazard or present the reasonable possibility of

creating a hazard to public health, safety or the environment

Major violations are violations that are hazards to public health, safety or the environment as established by the LEA through inspection or direct observation.

The Administrative Civil Penalty Matrix

To better assist enforcement agencies in assessing amounts for a civil penalty, the Administrative Civil Penalty matrix was created. The matrix contains two scales; a top and a side scale.

The top scale refers to the extent of "deviation" from a statutory or regulatory requirement. Deviation can be defined as the degree to which the requirement has not been complied. For example, a violator could be in violation with an entire requirement or only a portion of that requirement. In addition, the violation may be either acute or chronic and the violator may be willing or unwilling to comply. In other words, there will always be a range of potential non-compliance with the subject requirement. The side scale of the matrix refers to the category of violations as defined above and as assessed by the enforcing agency. Under the matrix, the deviation range varies from a Minor/Minor to a Major/Major with penalties ranging from a minimum of \$50 to a maximum of \$5000 per violation per day. The three categories allow for a deviation from compliance, which in turn allow the enforcement agency greater flexibility in calculating an appropriate penalty.

**CIVIL PENALTY TABLE
BASED ON USEPA RCRA GUIDELINES**

DEVIATIONS

	Minor	Moderate	Major
Minor	\$50-250	\$250-500	\$500-1000
Moderate	\$250-500	\$500-1000	\$1000-3000
Major	\$500-1000	\$1000-3000	\$3000-5000

As outlined in section 45011 (a)(1) an enforcement agency may issue an order imposing a civil penalty of no more than \$5000.00 per day per violation with a maximum of \$15,000.00 per calendar year.

LEA Discretion

The decision to impose an administrative civil penalty, is solely left up to the EA. The decision of how to define the violation, i.e. minor, moderate, major is more a matter of judgment since the facts of each situation must be applied logically to the three definitions.

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Choosing the Right Category

The reviewing authority must, in each individual case, apply the facts of that case to the descriptions outlined in the penalty categories.

A. In order for the violation to be placed in the "major" category, the violation must be the cause of the actual hazard, not just somehow be associated with the hazard.

B. The purpose of disposal site operation laws and regulations is to protect people and the environment from harm. Therefore, any violation of these laws and regulations creates at least the reasonable possibility of creating a health effect and should be placed in the moderate category.

C. Violations of administrative "procedural" requirements, (failure to keep a log of special occurrences, weight and volume records, etc.) are usually considered minor violations. There may be a circumstance where an argument could be made that a procedural violation should be placed in the moderate category.

D. Inspections/investigations resulting from a complaint, illness or environmental catastrophe most often include "major" violations but also frequently reveal many procedural violations. These violations may or may not be associated in some way with the "major" violations. Reviewing authorities must guard against the tendency to classify all the violations as the same category.

E. Most of the statutory and regulatory requirements are designed to directly protect people and the environment. Procedural requirements are designed to be indirectly protective. Therefore, in almost all cases a violation of a substantive (i.e., non-procedural) requirement will be at least a moderate violation. Deciding whether that violation is "major" generally hinges only on identifying whether or not the conditions produced by a violation represent an actual hazard.

F. To classify all violations as minor unless there was actual injury or environmental damage is not appropriate.

Economic Benefit

In addition to the Matrix, the reviewing authority(ies) may want to also employ a calculation of the economic benefit of non-compliance. Economic benefit is defined as the benefit gained when a person or facility who violates the California Integrated Waste Management Act avoids or delays costs associated with facility operations and functions necessary to achieve regulatory compliance.

It should be understood that violators should not benefit economically from non-compliance or gaining a competitive advantage. Therefore, a penalty calculated under this component, must deprive violators of economic benefit gained by avoiding or delaying compliance with the law.

In many circumstances, the economic benefit of noncompliance may be insignificant, such as a procedural violation (e.g. paper work violation). In these instances, pursuit of penalties, may prove to be an inefficient use of staff resources. Professional judgment should be used to determine if any economic benefit should be imposed and if a penalty is the correct enforcement tool.

A. Delayed Costs Benefit:

These are expenditures that have been deferred by failing to comply with facility requirements. The violator will eventually have to spend the money in order to achieve compliance but has the benefit of having the money prior to that time. For example, by delaying a \$50,000 expenditure for one year, at an investment rate of 5%, the violator has realized a \$2500.00 economic benefit. Examples of violations that result in savings of delayed costs are:

- Failure to remediate existing gas control violation as required;
- Failure to install an adequate gas monitoring system.
- Failure to perform adequate grading operations.

B. Avoided Costs Benefit:

Avoided costs are expenditures that the violator avoids by failing to comply with facility requirements. For example, one type of avoided cost would be when a facility fails to pay necessary operating and maintenance costs, which may also include periodic costs (such as leasing monitoring equipment).

Examples of violations that result in savings from avoided costs are:

- Failure to perform routine gas monitoring;
- Failure to train personnel
- Failure to apply daily cover.

C. Economic Benefit Calculation:

In calculating the economic benefit for a violator, the basic assumption is that the violator did realize some economic benefit, by either delaying or avoiding compliance. Although delayed and avoided costs are calculated somewhat differently, both calculations involve the use of an interest factor to account for use of money over time.

The interest factor may be derived from: 1) the use of interest earned if the violator put the necessary money for compliance in a bank, 2) in the form of profit if the money was invested, or 3) if the violator had no capital to comply, the benefit would be in the form of not paying the interest on a loan to pay for compliance.

Examples given in this policy illustrate benefit gained when the interest factor is 5%. However, when calculating economic benefit, the reviewing authority should research the current term loan rates, 90 day T-Bill rates or other appropriate interest or loan rates to use as the interest rate factor.

For avoided costs, the economic benefit equals the cost of meeting compliance requirements, adjusted to reflect anticipated rate of return.

For delayed costs, because the violator will eventually have to pay the costs of meeting compliance requirements, the economic benefit is the return realized using the interest factor. In either case, the reviewing authority should calculate the economic benefit for each year or partial year of noncompliance.

Below is an example of how one could use the economic benefit calculation:

Violation: Failure to Prepare a Closure Plan

This is a delayed cost.

Factors:

- Cost of plan;
- Period of noncompliance;
- Interest rate.

The ABC landfill is a medium size facility and was required to have a closure plan in January 1993, but did not have one until October 1994, three months after your inspection.

- Cost of plan: \$35,000
- Period of Noncompliance: 21 months (1.75 years)
- Interest rate: 5%

Economic benefit: $(\$35,000 \times 1.75) \times (5\%) = \3062.50

Other Factors Influencing Penalty Assessment

The enforcement agency should consider the following items when calculating a penalty:

- 1) Evidence that the violation(s) was willful or negligent.
- 2) The good or bad faith exhibited by the party or the extent to which the party has cooperated with the enforcement agency in remediating the violations.
- 3) The extent that the party has mitigated or attempted to mitigate any damage or injury caused by a violation(s).
- 4) The nature of violation
- 5) Recalcitrance

Documentation on Penalty Assessment

Documentation on how the reviewing authority arrived at the penalty amount, should be addressed to legal counsel. The reason for this is that any information exchanged between the reviewing authority and legal counsel would be covered under the attorney-client privilege and therefore, would avoid unnecessary explanations on how one arrived at each penalty amount. Furthermore, this approach would not be subject to outside review.

HEARING AND APPEAL PROCESS

As with any legal proceeding, due process would not be complete if the accused did not have the opportunity to be heard. As mentioned earlier, a respondent has an opportunity to request a hearing regarding the issuance of an enforcement action. A Notice and Order for Penalty Assessment

would allow a respondent an opportunity to be heard. Under current statutes, the following parties may request a hearing before a local hearing panel:

- any person subject to an action by the EA (PRC § 44310),
- the governing body prior to the EA imposing an administrative civil penalty (PRC § 45011)

Note: Any LEA enforcement action (including corrective action orders, cease and desist orders, notice and orders and imposition of administrative civil penalties) is cause for an operator to request a hearing (PRC § 44307).

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Hearing Time Limits

Within 15 days of receipt of written notice of an enforcement action, the person subject to an Enforcement Action must:

- File a written request for a hearing
- The person may decide not to request a hearing and waive his/her rights to a hearing and pay the assessed penalties.

Within 15 days of receipt of a written request for a hearing the EA must:

- Provide the person filing the request with a written notice of the date, time and place of hearing, and
- Request a statement of the issues that require a hearing from the person. The statement of issues must be provided to the EA at least 20 days prior to the date of the hearing.

Within 30 days from the date of hearing, the hearing panel shall issue its written decision.

The hearing panel may take the following actions:

- affirm the enforcement action,
- modify the penalty amount, or
- rescind the enforcement action and refer the issue back to the EA.

Failure to Request a Hearing or Untimely Filing of Issue Statement

The EA may take the proposed action without a hearing or may, at its discretion, proceed with the hearing before taking the proposed action if (PRC 44310):

- The aggrieved person, applicant, or operator fails to request a hearing within the 15 day request period, or
- The aggrieved person, applicant, or operator fails to file a statement of issues at least 20 days prior the date of the hearing.

Effective Date of Decisions

If no appeal is filed, written Hearing Panel decisions are effective immediately upon the conclusion of the filing period for an appeal (generally 30 days, unless otherwise specified).

Appeals of Hearing Panel Decisions

Appeal to CIWMB

An aggrieved party may appeal a decision of the Hearing Panel to the California Integrated Waste Management Board (CIWMB). The CIWMB can choose not to hear the appeal in certain situations; if the CIWMB hears the appeal, the CIWMB may:

- Affirm the hearing panel's decision, or
- Find the decision inconsistent with PRC and direct the EA to take appropriate action

Appeals to Superior Court

An aggrieved party may also file an action with the superior court to contest any action of the EA or the CIWMB.

APPLICABLE GOVERNMENT CODE SECTIONS

The following Government Code sections may be applicable to the Hearing Panel procedures. It is recommended that persons involved in the hearing process review and familiarize themselves with the Government Code sections below, since these are only paraphrased in this document. Also, in order to fully interpret the hearing procedures, an attorney should be consulted.

Discovery.

Sometimes, a party may wish to obtain information from the opposing party before the hearing about the alleged violation. Several sections of the Government Code provide a detailed explanation of the rights and procedures for discovery of information. Keep in mind that certain information cannot be discovered and should not be given to the opposing party, such as attorney-client privileged documents; completely irrelevant documents; attorney notes and research, etc. If an owner/operator makes a discovery request to the LEA, or if the LEA wishes to discover information from the owner/operator, the specific timing and procedural rules in Government Code sections 11507.5, 11507.6, 11507.7, & 11511 should be followed closely. Discovery can be accomplished through several methods:

- Depositions
- Request for detailed information, including:
 - List of witnesses that will be called to testify

- Writings relevant to the hearing
- Investigative reports
- Request for statements of certain people regarding the subject matter of the hearing

If a party refuses to cooperate in responding to discovery requests, the opposing party may file a petition in superior court to compel disclosure of the requested information.

Subpoenas

Witnesses may be subpoenaed to testify at the hearing and may be required to bring relevant documents. Government Code section 11510.

Hearing Procedures

The hearing is conducted with an Administrative Law Judge present, in a manner similar to a superior court trial, with examination and cross examination of witnesses. However, the strict rules of evidence used in superior court are not always followed. In addition, a party may use an affidavit containing the statement of a witness, unless the opposing party objects. Government Code sections 11513, 11514 & 11515.

Ex Parte Communication

The parties and their employees should not communicate with any member of the hearing panel while the hearing is pending. Government Code Section 11513.5

IV. Board Assistance

LEGAL ASSISTANCE

General Assistance

The Board may, upon the written request of the Enforcement Agency, provide legal counsel for the purpose of bringing solid waste facilities into compliance with applicable laws and regulations. (PRC § 43215.1). Where the county counsel has a conflict or other constraint preventing them from assisting an LEA, the LEA can contact the Board's chief counsel to discuss the possibility of legal advice and assistance.

Cost recovery for Corrective Action Expenditures

If an LEA expends funds to take corrective action at a facility, the amount expended shall be recoverable in a civil action by the Attorney General (AG) upon request of the LEA pursuant to PRC §

45000(d). The LEA should directly contact the AG's office to request representation in this type of case.

Petition for Injunction

a) If an owner/operator fails to comply with a final administrative order issued by the LEA, the LEA can contact the Board's legal counsel to obtain assistance from the AG. Upon the request of the Board, the AG shall petition the superior court for an injunction, restraining the operator from continuing to violate the order. (PRC 45014(a)). As an alternative, The LEA can utilize its own legal counsel in petitioning the superior court for an injunction or request direct Board assistance. (PRC §§ 43215.1 & 45014(b)).

b) Apart from the administrative enforcement and penalty process, an LEA has the right to bypass the issuance of a N&O and go directly to superior court to obtain an injunction to enforce laws, regulations and the SWFP applicable to the facility. In this case, the LEA can utilize its own legal counsel, request board assistance or request AG assistance. However, in this case, the AG is not bound by law to assist, as in the case outlined above (PRC 45014(b)).

Petition for Civil Penalties

The LEA can utilize its own legal counsel in petitioning the superior court for the assessment of civil penalties, request board assistance or request AG representation. Civil penalties may be sought as the result of an operator failing to comply with a N&O or directly, without the prior issuance of a N&O. (PRC §§45014(c), 45023 and 45024).

TECHNICAL ASSISTANCE

Board staff have developed templates of the following documents for use by LEAs:

Notice and Order
Stipulated Order of Compliance
Declaration/Affidavit
Notice and Order for Penalty Assessment

These templates have gone through Board legal review. The Notice and Order for Penalty Assessment is provided as Attachment 7. The Notice and Order, Stipulated Order of Compliance and Declaration/Affidavit were previously provided to LEAs. Please contact your Board enforcement liaison for additional copies.

Additionally, Board staff is always available to assist LEAs upon request through review and comment on draft compliance schedules, N&Os, Stips or NOPAs. Board staff requests a 5 working day time frame for reviewing the document and sending the comments back to the LEA. Board staff is also available to confer with LEAs and assist in the development of overall enforcement strategies for a particular site or sites with multiple violations and/or complex enforcement issues.

FINANCIAL ASSURANCES ASSISTANCE

The Board is directly responsible for enforcement of financial assurance violations. The Board's financial assurances section liaison for individual LEA jurisdictions should be contacted regarding enforcement of financial assurance violations at applicable facilities. Regulations are currently being developed by the Board in order to fully implement the financial assurances enforcement program.

ATTACHMENT 1

California Integrated Waste Management Board
Enforcement Advisory Attachment

Letter from the Board to LEAs Regarding
Implementation of Cease and Desist
Requirements for Unpermitted Facilities
(PRC Section 44002)



Cal/EPA

California
Environmental
Protection
Agency

Integrated
Waste
Management
Board

8800 Cal Center
Dr.
Sacramento CA
95826
(916) 255-2200

Pete Wilson
Governor

James M.
Strock
Secretary for
Environmental
Protection

August 20, 1996

LOCAL ENFORCEMENT AGENCIES

**RE: Implementation of AB59 Cease and Desist Requirement for
Unpermitted Solid Waste Facilities**

Integrated Waste Management Board (Board) staff are aware that LEA's throughout the state have identified unpermitted solid waste facilities currently in operation. On October 16, 1995, Governor Wilson signed Assembly Bill 59 (AB 59). That bill would, among other things, require all solid waste facilities which are operating without a solid waste facilities permit (SWFP) on October 16, 1996 to close until such time that a valid SWFP is issued for the subject facility. The statute that requires compliance with this law is Public Resources Code (PRC), Section 44002. As you are aware, the responsibility for closing any such facilities in your jurisdiction would be the obligation of your agency.

For the purposes of fulfilling the obligation of this statute, the Board would like to clarify the definition of unpermitted facility. The appropriate use of the term would apply to traditional solid waste facilities, i.e., landfills, transfer stations, transformation and compost facilities which require a solid waste facilities permit and have never had a SWFP. It would also apply to non-traditional SWF's which have been slotted into the registration, standardized or full permit tier categories and have been required to be operating under one of these SWFP's. In other words, the non-traditional activity has been slotted into a SWF permitting tier of registration or above, regulations have been promulgated and any or all grace periods granted in regulation to obtain the appropriate level of SWFP have expired.



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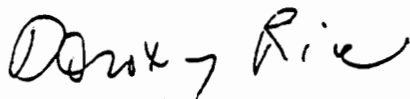
A few points of elaboration on the October 16, 1996 cease and desist (C+D) requirements:

- Notification tier operations are not subject to C+D provisions since they are not considered facilities.
- A change of owner or operator would not automatically require the issuance of a C+D. PRC 44005 now outlines a new process for a change of owner or operator.
- Non-traditional facilities are not subject to a C+D if regulations have not been promulgated which indicate whether or not these activities are facilities, operations, or whether the activity even falls within the Board's jurisdiction. Since there is no statutory or regulatory basis indicating that these non-traditional activities are subject to the 10/16/96 C+D requirements.
- If an LEA has determined that a new activity on a permitted facility will be addressed by a revision of the permit and can provide documentation in the record that an application has been submitted and that reasonable progress is being made to obtain the revised permit, the activity is not subject to the 10/16/96 C+D requirements.
- If an LEA has determined that a new activity on a permitted facility will require a new and separate permit, the activity is subject to the 10/16/96 C+D requirements.
- Finally, if a facility is operating outside the terms and conditions of its SWFP, that in itself is not cause for an LEA to necessarily issue a C+D. In such cases, appropriate enforcement actions pursuant to your EPP should be taken by your office to achieve compliance with permit conditions and a revision of the SWFP should be considered.

In the case of registration permits, because Board concurrence is not mandatory, LEA's will have up until the closure date of October 16 to issue such a document.

Please feel free to discuss any questions regarding this issue with Board staff from the Permits, CEQA or Enforcement Branches at your earliest convenience. Board staff look forward to working with you towards a solution which will lead to the issuance of valid SWFP's for all unpermitted facilities. If you have any questions regarding this letter, please contact Sue Happersberger of the Enforcement Branch at (916) 255-3893.

Sincerely,



Dorothy Rice
Deputy Director
Permitting and Enforcement Division

ATTACHMENT 2

California Integrated Waste Management Board
Enforcement Advisory Attachment

Sample Notice of Violation

NOTICE OF VIOLATION

Name SOLID WASTE MANAGEMENT DEPARTMENT Date NOVEMBER 16, 1994
COUNTY OF SAN BERNARDINO
Address ATTN: MIKE WALKER, INTERIM DIRECTOR Zone District _____
222 W. HOSPITALITY LANE
SAN BERNARDINO, CA 92415-0017 Assessor's Parcel No. _____

An investigation of your premises was made on MONTHLY

Location of property MILLIKEN SANITARY LANDFILL #36-AA-0049
2050 S. MILLIKEN AVE.
ONTARIO, CA 91764

YOU ARE CHARGED WITH THE FOLLOWING VIOLATION(S)

PRC 44014(b); 14CCR 17616 & 17681, FAILURE TO SUBMIT COVER INFORMATION PLAN AND
REVISE RDSI FOR MILLIKEN SANITARY LANDFILL

YOU ARE HEREBY ORDERED TO COMPLY by

SUBMITTING FOR APPROVAL THE FOLLOWING DOCUMENTS:

1. Update amendments to Milliken RDSI.
2. Cover importation plan to include description (analysis of composition of soil),
address quality of material for daily cover usage; number of daily truckloads
and volumes; and copies of any applicable excavation permits.
3. Mitigation and solutions to ameliorate sub-standard cover material.

COMPLIANCE OF VIOLATION MUST BE WITHIN 18 DAYS OF THIS ORDER. FAILURE TO COMPLY
MAY RESULT IN LEGAL ACTION.

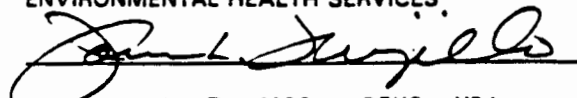
If you have any questions, contact Investigator
Monday through Friday, 8:00 - 9:00 a.m.

Phone 909/387-4655

Address 385 N. Arrowhead Ave.

San Bernardino, CA 92415-0160

Environmental Management Group
ENVIRONMENTAL HEALTH SERVICES


James L. Trujillo, REHS, MPA

WASTE MANAGEMENT/LEA SECTION **243**

ATTACHMENT 3

California Integrated Waste Management Board
Enforcement Advisory Attachment

Sample Compliance Agreement and Compliance
Schedule

SAMPLE COMPLIANCE AGREEMENT
Developed by Operator

July 22, 1994

Subject: Benson Sanitary Landfill Compliance Agreement

On July 17, 1994, Mr. Vern Maxon from your agency performed an inspection at the Benson Sanitary Landfill, Coombs County. Following this inspection, a compliance meeting was held on July 21, 1994 to discuss the results of the inspection and also the necessary compliance work to follow. The meeting was held at your office with the Public Works and LEA staff in attendance. The following list of violations, noted during the inspection, were discussed in detail:

1. 17682 - Cover
2. 17711 - Litter
3. 17708 - Drainage and Erosion Control

It was requested that a compliance agreement be submitted which will include the method and dates by which the violations will be corrected.

This letter is in response to your request for a compliance agreement. The methods by which the violations will be corrected are described in detail and the time frame for compliance does not exceed 90 days from the issuance of this letter. The following are the corrective measures and time frame for each violation:

1. 17682-Cover

Compliance Date: 7/29/94

Our agreement with the operator contract specifies that all refuse material shall be covered with a minimum of 6" of dirt and compacted by the end of each working day. This violation has been discussed with the operator and he is instructed to cover daily without exception, as spelled out in our agreement and to comply with all requirements. We have increased our monitoring of his performance to insure contractor compliance with the requirements.

2. 1771- Litter Control Compliance Date: 8/25/94

The operator has been instructed to pick up litter around the site. Public works will purchase and install litter fencing to prevent off-site migration in the future.

3. 17708- Drainage and Erosion Control Compliance Date: 10/21/94

The erosion is being repaired and the contractor has been instructed to look for and repair future erosion promptly. Additionally, a diversion ditch will be designed and constructed along the northwest portion of the landfill to prevent future occurrences.

All violations pointed out in your July 17, 1994 report are being corrected and the expected completion date is October 21, 1994. Should you have any questions, please contact this office.

Very truly yours,

M.K. Benson
Director

LDM:AAA:jb
DAY8
Enclosure - Schedule

Owner/Operator: Coombs County Public Works Department

By _____ Date: _____

Title: _____

LEA: Coombs County LEA

By _____ Date: _____

Title: _____

SAMPLE COMPLIANCE SCHEDULE

April 27, 1993

SUBJECT: To correct a violation of 14 CCR 17708 - Drainage and erosion control

We have investigated the drainage problems at the AAA Landfill and prepared this long range drainage plan.

We propose to complete the hydrology and hydraulic study of the area tributary to the wash out of the drainage system at the southwest corner of the landfill, determine the root cause of the wash out, design a permanent solution and, after the necessary approvals, construct the permanent solution. We estimate the required time schedule for this work will be 4 months, or until August 31, 1993, to completion of construction.

We propose to regrade decks and eliminate ponding onsite on north slope of the newer unit, on the top deck and the toe of slopes as required to drain all areas at a slope of 1% or greater. Our contractor will accomplish this work prior to May 31, 1993.

All waste material washed into the borrow pit because of failure in the southwest down drain system will be removed by our contractor from the soil after it has been excavated and hauled to the top deck working face as cover material. Timing will depend on the drying up of the standing water presently in the pit. We estimate that the excavation and haul will require approximately 3 months to complete in this area of the pit, or before July 30, 1993, provided the pit is dry enough for the equipment to operate in it on or before May 3, 1993.

The southeast corner collection basin will be excavated by our contractor beginning approximately June 4, 1993 and completed on or before July 30, 1993.


The southerly perimeter dike has been completed and will be dressed up by our contractor prior to April 30, 1993. This dike will prevent flow across the southerly property line.

The northeasterly property will be staked and graded by our contractor to flow to the east and southerly to the area north of the entrance road. This redirection of flow will prevent the erosion and breaching of the dike.

The northeast collection basin will be excavated by our contractor and the dikes reconstructed to prevent drainage from the north from flowing into the basin. This work will be accomplished between August 2, 1993 and approximately September 16, 1993.

Page 2/Compliance Schedule Cont.

Our purpose is to make all necessary corrections as soon as is practicable.


Signed: Jerry Buckner
Operations Manger
AAA Landfill

ATTACHMENT 4

California Integrated Waste Management Board
Enforcement Advisory Attachment

Guidance on Case Development

GUIDANCE ON CASE DEVELOPMENT

**This attachment is currently still under development and will be available prior to the January 97 Board meeting.

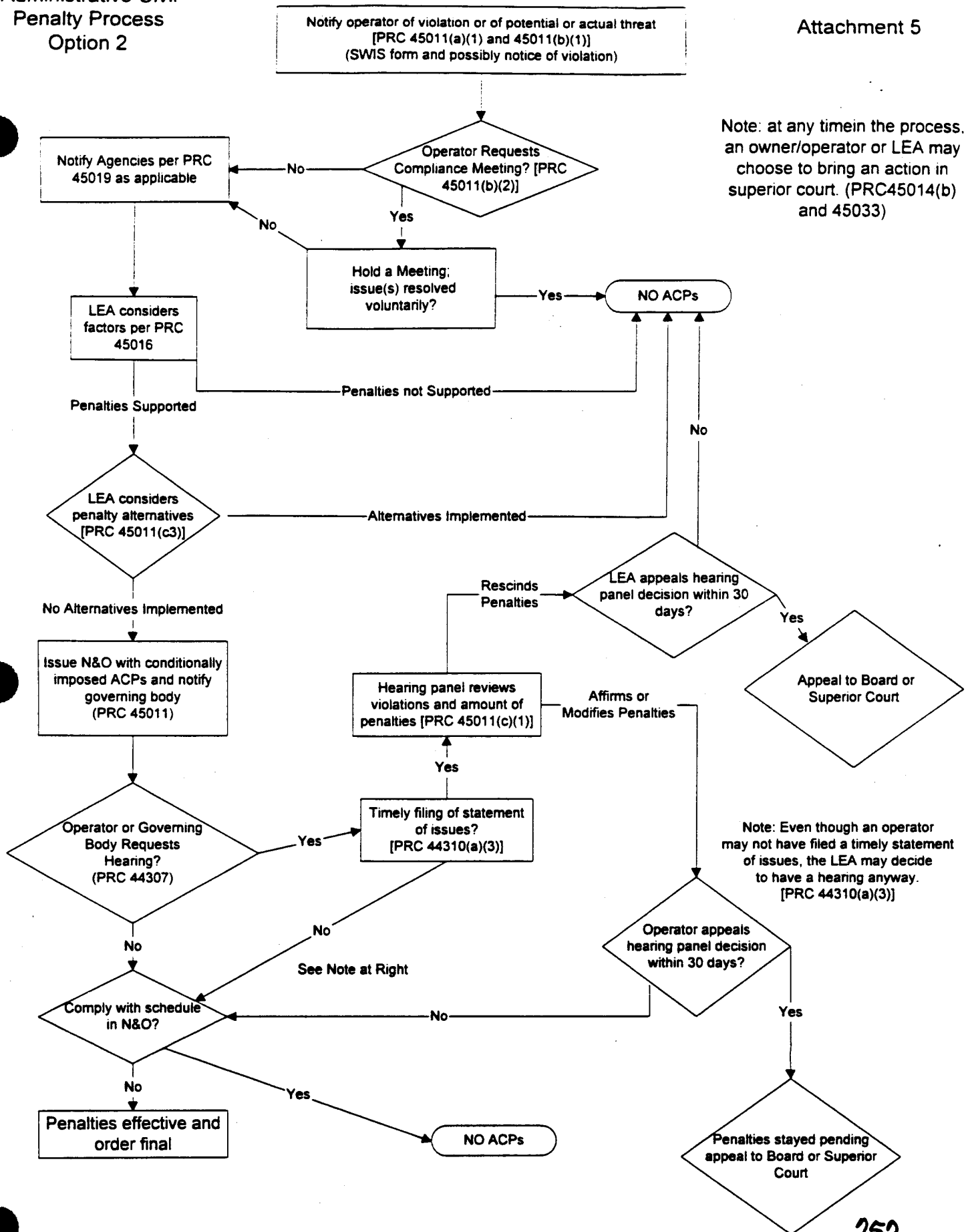
ATTACHMENT 5

California Integrated Waste Management Board
Enforcement Advisory Attachment

Administrative Civil Penalty Flow Chart,
Option 1

Administrative Civil
Penalty Process
Option 2

Attachment 5

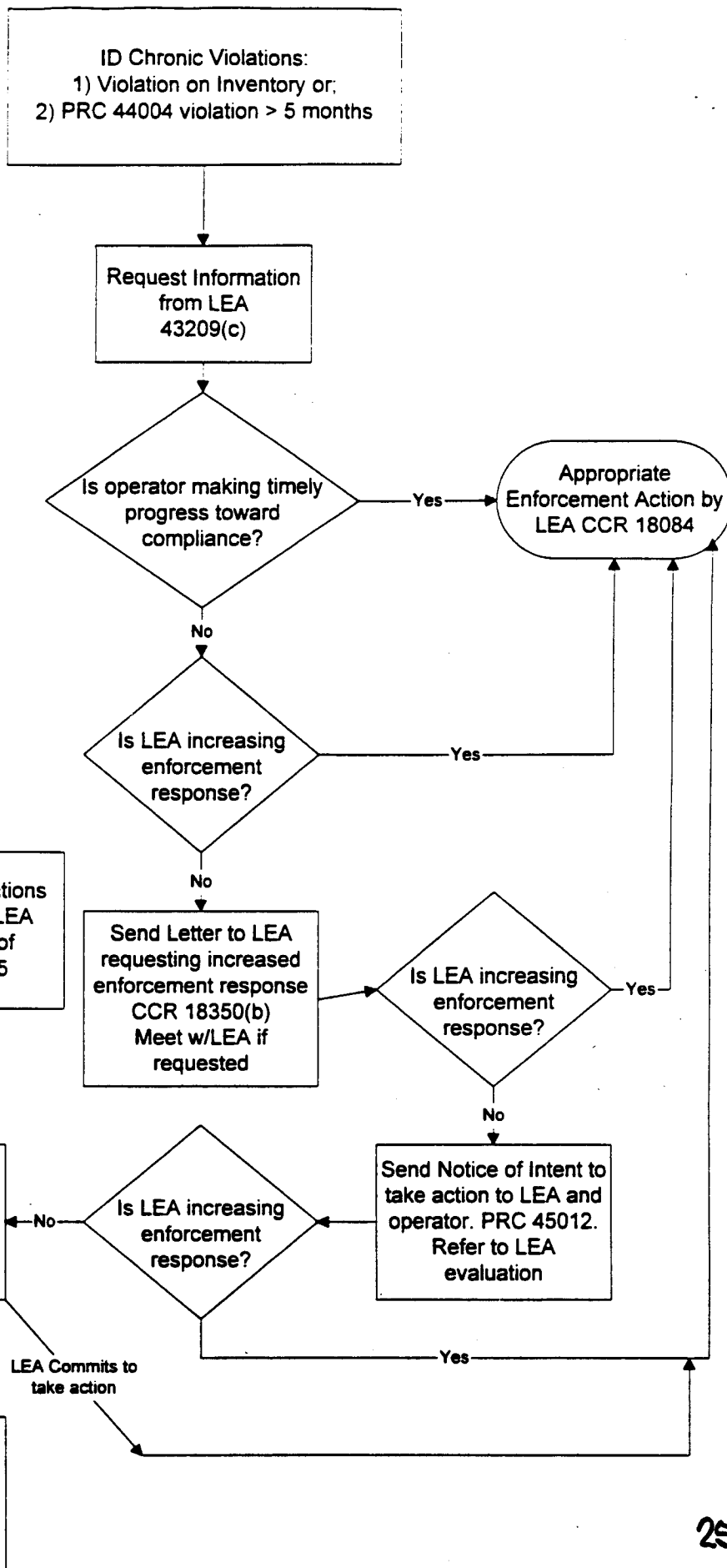


ATTACHMENT 6

California Integrated Waste Management Board
Enforcement Advisory Attachment

Administrative Civil Penalty Flow Chart,
Option 2

Enforcement
Oversight Flowchart
11/15/96 Draft



ATTACHMENT 7

California Integrated Waste Management Board
Enforcement Advisory Attachment

Notice and Order for Penalty Assessment
Template

COUNTY OF NAME OF COUNTY
TITLE OF ENFORCEMENT AGENCY

In the Matter of:)	NOTICE AND ORDER FOR
)	PENALTY ASSESSMENT
)	
NAME OF OPERATOR)	
NAME OF FACILITY)	<u>FILING NUMBER</u>
)	
)	PUBLIC RESOURCES CODE
)	SECTION 45011
)	
)	
)	

1.0 INTRODUCTION

1.1 The NAME OF ENFORCEMENT AGENCY (EA) issues this Notice and Order for an Administrative Penalty (ACP) Assessment to NAME OF OPERATOR (HEREAFTER REFERRED TO AS RESPONDENT), as the operator of the NAME OF SOLID WASTE FACILITY (Solid Waste Facility).

1 1.2 Section 45011 of the Public Resources Code (PRC)
2 authorizes the Enforcement Agency to issue an Order establishing
3 a date certain for full compliance and assess a civil penalty to
4 be imposed administratively if any solid waste facility: 1) is in
5 violation of Division 30 of the PRC, any regulations adopted
6 pursuant to Division 30 of the PRC, any corrective action or
7 cease and desist order, or 2) poses a potential threat or actual
8 threat to public health and safety or the environment. This
9 complaint is so issued based on the following facts:
10

11 2.0 STATEMENT OF FACTS

12 2.1 The Enforcement Agency has the authority to inspect,
13 permit, and conduct enforcement actions against Solid Waste
14 Facilities (SWFs) within the State of California under PRC
15 section 43209, et Seq., and attendant regulations contained in
16 Title 14 of the California Code of Regulations (CCR).

17 2.2 **RESPONDENT(S)** is/are the operator of the NAME OF
18 FACILITY and is responsible for solid waste violations at ADDRESS
19 OF FACILITY, in CITY, TOWNSHIP OR COUNTY, California.

20 2.3 This facility is in violation of Title 14 CCR
21 § _____ and § _____ .

22 2.4 On _____, 19____, Mr./Ms. _____ (OF THE EA)
23 accompanied by Mr./Ms. _____ of the _____ (ACCOMPANYING
24 AGENCY, IF THERE IS ONE) conducted a solid waste facility
25
26
27
28

1 inspection of the **NAME OF FACILITY** and documented violations of
2 Title 14 CCR sections _____ and _____.

3 2.5 An **"Inspection Report"** dated _____, 19__ was
4 addressed and posted by U.S. Mail, or hand delivered, by
5 Mr./Ms. _____ of the **EA** to **RESPONDENT(S)** requesting
6 correction of the violations(s) by _____, 19__. A true and
7 correct copy of that **"Inspection Report"** is attached hereto as
8 **"Exhibit 1"**. This Report states that the facility operator is
9 violating PRC Section(s) and Title 14 CCR Section(s) _____, and
10 _____. Correction of the violation(s) was not achieved as
11 documented in an **"Inspection Report"** dated _____, 19__. A
12 true and correct copy of that **"Inspection Report"** is attached
13 hereto as **"Exhibit 2"**.

14 2.6 A **"Notice of Violation"** dated _____, 19__ was
15 addressed and posted by U.S. Mail by Mr./Ms. _____ of
16 the **EA** to **RESPONDENT(S)** requesting that a Corrective Action Plan
17 be submitted to the **EA** by _____, 19__. A true and correct
18 copy of that **"Notice of Violation"** is attached hereto as **"Exhibit**
19 **3"**. No Plan was ever received. (Or other response as appropriate)

20 2.7 Notice & Order #__-__ dated _____, 19__ was issued
21 pursuant to 14 CCR 18304(b) by the **EA** to **RESPONDENT(S)** requesting
22 that all violations be remediated by _____, 19__. A true
23 and correct copy of that Notice & Order __-__ is attached hereto
24 as **"Exhibit 4"**.

1 2.8 A site inspection was conducted on _____, 19__
2 by Mr./Ms. _____ and Mr./Ms. _____ of the EA.
3 The conditions remained the same as during the _____, 19__
4 inspection. A copy of the site visit or inspection report is
5 attached hereto as "Exhibit 5".
6

7 3.0 ALLEGATIONS OF SPECIFIC VIOLATIONS

8 3.1 RESPONDENT(S) is/are in violation of Title 14, CCR §
9 _____ which lists requirement(s) for this standard.

10 RESPONDENT(S) has/have not complied with these requirement(s).

11 3.2 RESPONDENT(S) is/are in violation of Notice and Order
12 No. ____-____, issued to him/her by the ENFORCEMENT AGENCY on _____
13 _____, 19__. Notice and Order No. ____-____ directed _____
14 RESPONDENT(S) to remediate ~~xxxxxxx~~ violation by _____, 19__.

15 Further, the Notice and Order required _____ to
16 _____ (OTHER SPECIFIED ACTIONS AS NEEDED) by _____,
17 19__. RESPONDENT(S) has/have not complied with these
18 requirements.

19 3.3 RESPONDENT(S) is/are in violation of PRC section 45000
20 or 45005 which requires any person, upon order of the EA, to
21 clean up, abate, cease and desist or otherwise take remedial
22 action at a SWF. RESPONDENT(S) has/have been ordered by the EA,
23 by Notice and Order No. ____-____, to take specific remedial action
24 at the NAME OF FACILITY but has not complied with this
25 requirement.
26
27
28

4.0

PENALTIES

4.1 The **ENFORCEMENT AGENCY'S** authority to assess administrative civil penalties (ACP) against **RESPONDENT(S)** is set forth in PRC section 45011, which states, in part:

"the Enforcement Agency may issue an order establishing a time schedule according to which the facility shall be brought into compliance with this division. The order may also provide for a civil penalty, to be imposed administratively by the enforcement agency in an amount not to exceed five thousand dollars (\$5,000) for each day on which a violation occurs, and not to exceed a total amount of fifteen thousand dollars (\$15,000) in any one calendar year if compliance is not achieved in accordance with that time schedule."

4.2 In setting an appropriate administrative civil penalty, the Enforcement Agency has taken into consideration the nature, extent and gravity of the violations, and the complete disregard of applicable statute and regulation on the part of the **RESPONDENT(S)**. The **Enforcement Agency** hereby orders that (name of respondent) be assessed an administrative civil penalty in the amount of (\$?0,000)/day (in the total amount of \$?0,000) for the violation of PRC section _____ or Title 14 Section _____ which occurred for ____ day(s). The penalty is due now and payable.

DATED: _____

Mr./Ms. _____
Staff Counsel
County of _____, EA